No. 91-1833 (4)

In the Supreme Court of the United States

OCTOBER TERM, 1992

EVERETT R. RHOADES, M.D., DIRECTOR OF THE INDIAN HEALTH SERVICE, ET AL., PETITIONERS

v.

GROVER VIGIL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that statements made in congressional committee reports and hearings on lump-sum appropriations bills, together with general notions of the federal "trust" responsibility for Indians, constitute "law to apply" for purposes of judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, of agency action affecting Indians.

2. Whether the court of appeals erred in holding that an agency's decision to reallocate funds and personnel from a discretionary pilot project providing certain health-related services for Indians in order to provide other health-related services for Indians constitutes a rule subject to the notice-and-comment requirements of the APA, 5 U.S.C. 553.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 953 F.2d 1225. The opinions of the district court (Pet. App. 17a-45a, 46a-56a) are reported at 746 F. Supp. 1471.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 1992. On April 3, 1992, Justice White extended the time for filing a petition for a writ of certiorari to and including May 14, 1992, and the petition was filed on that day. It was granted on October 5, 1992. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of the Snyder Act, 25 U.S.C. 13; the Indian Health Care Improvement Act (IHCIA), 25 U.S.C. 1601 *et seq.*; the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*; and the appropriations acts for the Indian Health Service for fiscal years 1980 and 1985, Act of Nov. 27, 1979, Pub. L. No. 96-126, Tit. II, 93 Stat. 954, 973-974, and Act of Oct. 12, 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1837, 1863-1865, are reproduced at Pet. App. 57a-73a.

STATEMENT

1. The Indian Health Service (IHS) is an agency within the Public Health Service of the Department of Health and Human Services. The IHS provides a wide range of health services for approximately 1.5 million American Indian and Alaska Native people. IHS services are delivered through more than 500 direct health-care delivery facilities, including 50 hospitals, 158 health centers, 7 school health centers, and approximately 300 health stations and satellite clinics and Alaska village clinics. *Department of the Interior and Related Agencies Appropriations Bill, 1993*, H.R. Rep. No. 626, 102d Cong., 2d Sess. 101-102 (1992). The IHS has approximately 12,000 employees, 15 *Fiscal Year 1993 Justifications of Appropriation Estimates for Committee on Appropriations*, at IHS-26, and currently operates under lump-sum appropriations by Congress that make available more than $1.5 billion for operating expenses and more than $336,000,000 for capital expenses for fiscal year 1993. See Pub. L. No. 102-381, 106 Stat. 1407-1409.

The IHS allocates and spends its appropriated funds under the authority of the Snyder Act, 25 U.S.C. 13, and the Indian Health Care Improvement Act (IHCIA), 25

U.S.C. 1601 *et seq.* The Snyder Act provides in relevant part that the agencies responsible for Indian Affairs "shall direct, supervise, and expend such moneys as Congress may * * * appropriate, for the benefit, care, and assistance of the Indians * * * for the * * * relief of distress and conservation of health." 25 U.S.C. 13.[1] Title II of the IHCIA authorizes supplemental appropriations in a number of broad health-related areas, including patient care, field health (preventive, environmental and public health), and mental health. 25 U.S.C. 1621.[2]

The IHS has adopted general regulations implementing its authority to provide health services to Indians. Those regulations state that "[t]he services provided to any particular Indian community will depend upon the facilities and services available from sources other than the [IHS] and the financial and personnel resources made available to the [IHS]." 42 C.F.R. 36.11(c);[3] see also 42 C.F.R.

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[1] The Snyder Act applies by its terms only to the Bureau of Indian Affairs (BIA), an agency within the Department of the Interior. The Indian Hospitals and Health Facilities Act, 42 U.S.C. 2001, transferred responsibility for Indian health from the BIA to the Department of Health and Human Services.

[2] Title II authorizations were initially for three fiscal years (FY 1978 to FY 1980). The authorizations were extended by the Indian Health Care Amendments of 1980, Pub. L. No. 96-537, § 4, 94 Stat. 3174, through fiscal year 1984. Between 1984 and 1988, the IHCIA lapsed, but it was amended and reauthorized in 1988 by Pub. L. No. 100-713, Tit. II, § 201(a), 102 Stat. 4800, and in 1992 by Pub. L. No. 102-573, 106 Stat. 4526.

[3] The regulations provide:

> (a) Type of services that may be available. Services for the Indian community served by the local facilities and program may include hospital and medical care, dental care, public health nursing and preventive care including immunizations, and health examination of special groups such as school children.
>
> (b) Where services are available. Available services will be provided at hospitals and clinics of the Service and at contract

36.12(a) (1986) (services will be provided to qualified persons of Indian or Alaska Native descent "to the extent that funds and resources allocated to the particular Health Service Delivery Area permit").[4]

Title II of the IHCIA authorized spending for "therapeutic and residential treatment centers." 25 U.S.C. 1621(a)(4)(D). As the report of the House of Representatives committee explained, one of the purposes of that provision was to authorize funds "to establish therapeutic and residential treatment centers for disturbed Indian children to provide these children with intensive care in a residential setting * * *. The plan is to develop a major cooperative care agreement between the IHS and the BIA using suitable BIA facilities in convenient locations." H.R. Rep. No. 1026, 94th Cong., 2d Sess. 80-81 (1976); see Pet. App. 4a.

Congress never appropriated funds expressly designated for the centers mentioned in 25 U.S.C. 1621(a)(4)(D). But in 1978, the IHS allocated approximately $292,000 from

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facilities (including tribal facilities under contract with the Service).

(c) Determination of what services are available. The Service does not provide the same health services in each area served. The services provided to any particular Indian community will depend upon the facilities and services available from sources other than the Service and the financial and personnel resources made available to the Service.

42 C.F.R. 36.11.

[4] Since 1988, Congress has suspended new eligibility regulations that had been promulgated on September 15, 1987, see 52 Fed. Reg. 35,049, to replace the eligibility requirements previously codified at 42 C.F.R. 36.12. See, *e.g.*, Pub. L. No. 100-713, § 719(a), 102 Stat. 4838. Accordingly, the currently applicable eligibility requirements can be found in the 1986 Code of Federal Regulations. Both the new and old requirements are identical in respects pertinent to the issues in this case and both include the language quoted in text.

its fiscal year 1978 appropriation to the IHS headquarters mental health branch in Albuquerque, New Mexico, for development of a pilot program for handicapped Indian children. Pet. App. 4a-5a. That program came to be known as the Indian Children's Program (ICP). Although the House committee report had envisioned "centers" located in BIA "facilities," the ICP originated in part as an effort to assess the need for a single treatment and diagnostic center for handicapped Indian children. Pet. App. 5a; *Department of the Interior and Related Agencies Appropriations for 1980: Hearings Before the House Subcomm. on the Department of the Interior of the House Comm. on Appropriations,* 96th Cong., 1st Sess. Pt. 8, at 245-252 (1979).

In 1979, the IHS included $3.5 million for a treatment and diagnostic center in its budget request for fiscal year 1980. The appropriations act for 1980 did not specify that funds in that or any other amount were to be made available for such a center, see Pet. App. 67a-69a, but the relevant committee reports did state that Congress had provided an increase of $300,000 in total funding for Indian health services in order to permit the expansion of the pilot handicapped children's program into a "nationwide" effort.[5]

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[5] The House Report stated:

[T]he Committee has provided an increase of $300,000 for expansion of the handicapped children's program. The funds will be used to provide diagnostic service to children with complex problems who reside nationwide and who require a sophisticated medical treatment for their disorders.

H.R. Rep. No. 374, 96 Cong., 1st Sess. 82-83 (1979).

The Senate Report expressed approval of the budget increase:

The Committee concurs in the House increases of * * * $300,000 to widen diagnostic, health and education services for handi-

In the fall of 1979, after a meeting with the IHS and Representative Sidney Yates, at that time chairman of the Interior and Related Agencies Subcommittee of the House Appropriations Committee, the BIA agreed to participate in the ICP and allocated $350,000 from the BIA's budget to support and supplement the existing IHS program. J.A. 28-29. In February 1980, the BIA and IHS entered into a memorandum of agreement to join in an "Indian Child Study Project." The memorandum provided that the pilot project was to "enable both BIA and IHS to assess the need for a multi-disciplinary medical/education complex to provide services to handicapped Indian children" and "designed to expand outreach services currently provided by the IHS-Indian Children's Program (ICP)." J.A. 38.

Despite the initial intentions, no "center" or "complex" for handicapped Indian children was ever established. Instead, as it ultimately evolved, the ICP employed between 11 and 16 IHS staff members to provide monitoring and assessment services for handicapped Indian children. The personnel were based in Albuquerque, and the ICP remained a regional pilot project serving reservation communities in New Mexico, Southern Colorado, and the Navajo and Hopi Reservations. J.A. 65, 80, 89. Staff members visited reservation communities about once a month. The services they provided included identification and diagnosis of mentally handicapped children,

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capped children. The current handicapped program, budgeted at $292,000, is little more than a consulting service for the Albuquerque, N. Mex., area. Under a cooperative agreement with the Bureau of Indian Affairs, which is to provide facilities, transportation, and educational services, the program should expand to one offering short-term residential care and referral services better designed to meet the health and education needs of Indian children from all areas of the Nation.

S. Rep. No. 363, 96 Cong., 1st Sess. 91 (1979).

development and monitoring of their treatment plans, "consultative visits" in the children's home communities, and training. Pet. App. 12a, 19a. The ICP personnel generally did not serve as primary furnishers of rehabilitative and other services to the children. J.A. 94. Rather, because staff members visited communities no more than once a month, the children they monitored had to seek primary therapy from whatever sources were available to them at local IHS facilities, at their schools, or from other providers, such as Medicaid and state health programs. J.A. 91-92, 94.

Congress never mentioned the ICP in legislation, and the IHS funded the ICP out of annual lump-sum appropriations throughout the period from 1980 to 1985. Pet. App. 6a, 11a-13a. A 1981 IHS review of the ICP criticized the local nature of the program and its lack of communication with other IHS programs. J.A. 72-73. That review, conducted by Dr. Robert Kreuzberg, then the IHS maternal and child health coordinator, emphasized the need for a national program more fully integrated with other IHS children's programs. *Ibid.* Dr. Kreuzberg expressed concern that the ICP, which was under the auspices of the IHS headquarters, was "politically and clinically" closely tied to the Albuquerque area and that the staff remained "autonomous" from the rest of the IHS system. *Ibid.*

By 1985, IHS management had decided that the staff efforts then being devoted to the ICP could be more effectively utilized within the IHS system if they were devoted instead to providing technical assistance and consulting services to all IHS areas and service units on a nationwide basis, as Congress had originally intended. Pet. App. 2a, 20a; see note 5, *supra*. Accordingly, the IHS decided to terminate the more narrowly focused ICP and to reallocate its resources to a nationwide effort. See Pet. App.

2a. In a memorandum dated August 21, 1985, the acting ICP clinical and administrative directors informed the IHS Area Offices, IHS service units, and all referral sources, that patient consultative services would be discontinued. J.A. 77-78; see also J.A. 80-81.[6]

2. Subsequently, respondents brought this class action in the United States District Court for the District of New Mexico seeking declaratory and injunctive relief. Respondents alleged that the termination of services offered to handicapped children through the ICP violated, *inter alia*, the "federal trust responsibility to Indians, the Administrative Procedure Act (APA), * * * the Snyder Act, * * * the Indian Health Care Improvement Act, * * * various agency rules and regulations, and their Fifth Amendment due process rights." Pet. App. 2a-3a. By order dated June 22, 1987, the district court certified a stipulated plaintiff class consisting of:

> all handicapped Indian children who in the past received, or who presently are, have been, or will be eligible to receive health services from the Indian Health Service in the Albuquerque Area, Navajo Area, and Hopi reservation portion of the Phoenix Area, including health services formerly available through the Indian Children's Program.

Pet. App. 21a.

On July 6, 1990, the district court granted summary judgment for respondents. Pet. App. 17a-45a. The court

[6] As of August 1985, the staff was following 426 children. Pet. App. 20a. The staff conducted concluding consultations with parents, professionals, and others concerned with each of those children. J.A. 84-86. The BIA continues to follow handicapped children in the ICP service area (and elsewhere) pursuant to its responsibilities under the Education for All Handicapped Children's Act (EAHCA), 20 U.S.C. 1400 *et seq.* The BIA has promulgated regulations recognizing that duty. See 25 C.F.R. 45.1.

held that the IHS's decision to terminate the ICP and reallocate its resources to a nationwide effort to ensure the availability of services to all handicapped Indian children was not "committed to agency discretion by law" within the meaning of 5 U.S.C. 701(a)(2). The court believed that the statutes involved, although broadly worded—together with Congress's awareness of the ICP when it made lump-sum appropriations for the IHS—provided "ample" law to permit a court to assess the IHS's action. Pet. App. 30a. The court held that the action was thus judicially reviewable.

The court further held that the decision to terminate the ICP constituted administrative rulemaking, reasoning that the APA "broadly defines an agency rule to include nearly every statement an agency may make." Pet. App. 38a (quoting *Batterton* v. *Marshall*, 648 F.2d 694, 700 (D.C. Cir. 1980)). The court rejected petitioners' argument that the termination decision was exempt from the APA's notice-and-comment provisions in 5 U.S.C. 553 because it involved merely an "interpretative" rule or "general statement[ ] of policy." See 5 U.S.C. 553(b)(A). In the court's view, because the termination had significant effects on private interests, it was a "legislative rule" subject to the notice-and-comment requirement. Because the IHS had not published its decision to terminate the ICP for public comment, the court held that the IHS's decision was procedurally invalid. Pet. App. 38a-44a. After further briefing, the district court issued an additional memorandum opinion and order, directing the IHS to reinstate the program. *Id.* at 46a-56a. A restored ICP is currently in place.

3. The court of appeals affirmed. Pet. App. 1a-16a. It acknowledged that manageable standards for reviewing the IHS's decision to terminate the ICP were "difficult to find" in the Snyder Act and the IHCIA, observing that the ICP "appears to have been created at the discretion of the IHS" and that respondents had "not cited any statute or

regulation which even refers to the Project or provides specific standards for reviewing its termination." Pet. App. 10a-11a. But the court nonetheless held that there was sufficient "law to apply" to permit judicial review. Referring to congressional hearing testimony and committee reports accompanying the lump-sum appropriations that fund the IHS's overall operations, the court first concluded that Congress "was informed of" and "intended to fund" the ICP, "albeit through general appropriations." *Id.* at 13a. In addition, the court believed that the "special relationship" between the Indian people and the United States "suggests that the withdrawal of benefits from Indians merits special consideration." *Id.* at 13a, 14a (quoting *Vigil* v. *Andrus*, 667 F.2d 931, 936 (10th Cir. 1982)).[7] In the court's view, this "special consideration," coupled with "Congress' recurring budgeting recognition of the Project," provided "an appropriate backdrop for judicial review" to determine whether IHS's action "ultimately does redound to the 'benefit, care and assistance' of Indians." Pet. App. 14a-15a.[8]

The court of appeals also held that the IHS was required to follow notice-and-comment rulemaking procedures before reallocating funds from the ICP to the nationwide effort. The court believed that holding to be required by *Morton* v. *Ruiz*, 415 U.S. 199 (1974), which in the court's view

[7] This case and *Vigil* v. *Andrus* involve different plaintiffs.

[8] Both lower courts appeared to believe that a ruling on the availability of judicial review on the substance of the termination decision was a necessary predicate to a decision on the rulemaking issue, but that is not necessarily true. The rulemaking provision of the APA, 5 U.S.C. 553, may itself provide "law to apply" for reviewing agency procedures, even if there is otherwise no jurisdiction to review the substance of an agency decision. See *Story* v. *Marsh*, 732 F.2d 1375, 1381, 1384 (8th Cir. 1984) (finding "the substance of the agency action largely unreviewable," but stating that "[t]his is not to say * * * that the procedures followed by the [agency] * * * are likewise unreviewable," and proceeding to consider whether the agency failed to comply with notice-and-comment procedure).

stands for the broad proposition that "notice and comment procedures should be provided any time the government 'cuts back congressionally created and funded programs for Indians' even when the Indians have no entitlement to the benefits." Pet. App. 15a (citing *Vigil* v. *Andrus*, 667 F.2d at 936).

SUMMARY OF ARGUMENT

The court of appeals' reasoning fundamentally distorts both appropriations law and administrative law, and it is inconsistent with decisions of this Court and of the lower courts. The decision strips discretion from federal agencies in allocating agency resources and improperly draws federal courts into a managerial role that rests with the Executive Branch. In addition, the decision requires an agency to undertake notice-and-comment rulemaking whenever a contemplated action could have an adverse impact on Indians. The imposition of such procedures furthers no purpose except to delay the delivery of health care services to communities in need.

1. Agency action is committed to agency discretion by law in "those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971). The decision to reallocate funds from the ICP to other services on behalf of Indian children falls within that category. The ICP program was not mandated, specifically authorized, or even mentioned by any Act of Congress. Neither the Snyder Act, 25 U.S.C. 13, nor the IHCIA, 25 U.S.C. 1601 *et seq.*, provides standards by which to review the decision to terminate the ICP. Likewise, regulations promulgated by the IHS merely state that the "services provided * * * depend upon the facilities and services available," 42 C.F.R. 36.11(c), and thus provide no meaningful standard.

The court of appeals erred in finding "law to apply" outside the relevant statutes and regulations. The court believed that statements made during congressional hearings and in congressional committee reports could provide law to apply. Not so. The IHS is not legally bound by suggested funding allocations that do not find their way into a law duly enacted by Congress. Although Congress may direct the expenditure of funds for a specific purpose or mandate the creation of a specific program by enacting legislation that so provides, mere committee reports and hearing statements concerning lump-sum appropriations lack the legal authority of such legislation. Since those sources do not impose binding obligations on an administrative agency, they cannot serve as "law to apply" by a court in reviewing agency action.

Nor can general notions of the "federal trust responsibility to Indians" constitute law to apply for purposes of APA review. The "trust" responsibility to Indians is implicated only where Indian property is at stake, *United States* v. *Cherokee Nation of Oklahoma*, 480 U.S. 700, 707 (1987), and the contours of any judicially enforceable trust relationship in that setting are supplied by statutes and regulations relevant to the property at issue. See *United States* v. *Mitchell*, 463 U.S. 206, 224 (1983). Funds allocated under the Snyder Act are gratuitous appropriations, not trust funds belonging to the Indians, and the United States therefore does not act as a fiduciary when it allocates those funds. *Scholder* v. *United States*, [illegible] F.2d 1123, 1128 (9th Cir.), cert. denied, 400 U.S. 942 (1970); *Quick Bear* v. *Leupp*, 210 U.S. 50, 80-81 (1908). Accordingly, the generalized notion of a federal "trust" responsibility to Indians neither imposes an obligation on the IHS to continue the regional ICP nor provides a meaningful standard by which a court can review the IHS's decision to expend its resources on other programs for the benefit of Indians instead of the ICP.

2. The court of appeals also erred in holding that the IHS's decision to discontinue the ICP was procedurally invalid because the IHS made that decision without employing notice-and-comment procedures applicable to rulemaking under the APA. In *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), this Court held that a decision to fund a highway project was not "rulemaking" under the APA. *Id.* at 414-415. That same reasoning applies to the IHS's decision not to continue funding the ICP as it was then constituted, and instead to devote its resources to a nationwide effort on behalf of handicapped Indian children. A contrary result would render each decision by the IHS and similar service-providing agencies to replace old equipment, alter the mix of services offered at each of its locations, or deploy its staff differently into a "rule" that could only be implemented after compliance with the APA.

In addition, the court of appeals' decision—by mandating notice-and-comment rulemaking whenever an agency cuts back on services for Indians—improperly imposes procedural requirements not dictated by statute, in violation of the principles this Court laid down in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 549 (1978). In this case, neither the APA, the Snyder Act, or the IHCIA requires notice-and-comment rulemaking. Nor does the court of appeals' conclusion find any support in this Court's decision in *Morton* v. *Ruiz*, 415 U.S. 199 (1974), which invalidated a rule of eligibility that an agency had failed to publish in accordance with its own, self-imposed requirements.

ARGUMENT

I. CONGRESSIONAL COMMITTEE REPORTS AND HEARINGS ON LUMP-SUM APPROPRIATIONS BILLS, TOGETHER WITH GENERAL NOTIONS OF A FEDERAL "TRUST" RESPONSIBILITY TO INDIANS, DO NOT CONSTITUTE "LAW TO APPLY" FOR PURPOSES OF JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT

Although agency action is generally presumed to be reviewable, see *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967), the APA provides two exceptions to that principle: (1) where "statutes preclude judicial review," or (2) where "agency action is committed to agency discretion by law." 5 U.S.C. 701(a). This court has held that agency action is committed to agency discretion by law in "those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971). See also *Webster* v. *Doe*, 486 U.S. 592, 600 (1988); *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985) ("[R]eview is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.")

Whether there is "law to apply" in a given case "requires careful examination of the statute on which the claim of agency illegality is based." *Doe*, 486 U.S. at 600. None of the statutes on which respondents rely provides any meaningful standard for judicial review of the decision by the IHS to devote to other purposes the resources it previously had spent on the ICP.

The Snyder Act simply authorizes the IHS and the BIA to expend whatever funds Congress may appropriate for the "benefit, care, and assistance" of Indians in a number of broad subject areas, including the "relief of distress and

conservation of health" of Indians. 25 U.S.C. 13. The Snyder Act does not require funds to be spent for any particular purpose; nor does it prescribe specific criteria to be followed by the IHS or BIA in allocating resources among their various programs for the "benefit, care, and assistance" of Indians.[9] In short, the Snyder Act imposes no obligation on the IHS or BIA to expend funds on one or the other of numerous programs that could come within the general "benefit, care, and assistance" standard, and it provides no judicially manageable standard for judging whether the decision to expend funds on a particular program was proper. Cf. *Scholder* v. *United States*, 428 F.2d at 1128 (rejecting contention that Snyder Act "present[s] federal courts with the unenviable task of reviewing individual [BIA] expenditures and speculating in each instance about [who are the] potential beneficiaries").

Likewise, the IHCIA provides no law to apply. The IHCIA supplements IHS's broad discretionary authority under the Snyder Act to expend appropriated funds on Indian health. Title II of the IHCIA authorizes supplemental appropriations over several years in the broad categories of (1) patient care (operation of IHS hospitals, health centers and clinics); (2) field health (preventive, environmental and public health); (3) dental care; (4) mental health; (5) alcoholism; and (6) maintenance and repair of

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[9] As this Court explained in *Morton* v. *Ruiz*, 415 U.S. 199, 205-206 (1974), the Snyder Act was comprehensively worded to provide the BIA with broad authority to expend funds to assist Indians, and thus to avoid point-of-order objections on the floor of the House or Senate to Indian assistance appropriations. This purpose of ensuring a broad range of flexibility in funding services for the benefit of Indians refutes the court of appeals' notion that the Snyder Act furnishes a basis for courts to entertain objections by private parties to the allocation of funds appropriated pursuant to that Act.

IHS facilities. 25 U.S.C. 1621. The IHCIA nowhere discusses the ICP or requires the IHS to spend any appropriated funds on the ICP. And the IHCIA's broad statements of purpose, like those in the Snyder Act, provide no standard for appraising whether the IHS should have continued to fund the ICP.

Not surprisingly—in view of the complete lack of reference to the ICP in the Snyder Act or the IHCIA—the court of appeals did not view either statute alone as furnishing "law to apply." Pet. App. 10a. To the contrary, the court conceded that "specific manageable standards for reviewing the funding termination are difficult to find in the Snyder Act * * * and the IHCIA." *Ibid.*[10] The court further observed that respondents had "not cited any statute or regulation which even refers to the Project or provides specific standards for reviewing its termination." Pet. App. 11a.[11] Thus, the court of appeals looked elsewhere for manageable standards of review. It ultimately settled on what it regarded as congressional recognition of the ICP, as reflected in committee reports and hearing

[10] Notwithstanding the fact that the respondents had not even alleged a violation of the Education for All Handicapped Children Act (EAHCA), 20 U.S.C. 1400 *et seq.*, in their complaint, see J.A. 4-19, the district court suggested that that Act also provided law to apply. Pet. App. 30a. The court of appeals, however, encountered the same difficulty in finding "specific manageable standards" for judicial review in the EAHCA that it had found in the Snyder Act and the IHCIA. Pet. App. 10a. As noted above, see note 6, *supra*, the BIA—but not the IHS—has statutory responsibilities under the EAHCA.

[11] Cf. *Webster* v. *Doe*, 486 U.S. at 602 n. 7; *United States ex rel Accardi* v. *Shaughnessy*, 347 U.S. 260, 267 (1954); *United States* v. *Nixon*, 418 U.S. 683, 695-696 (1974); *Center for Auto Safety* v. *Dole*, 846 F.2d 1532, 1534 (D.C. Cir. 1988); see also *Greater Los Angeles Council on Deafness, Inc.* v. *Baldridge*, 827 F.2d 1353, 1361 (9th Cir. 1987).

testimony, coupled with the "special relationship" between Indian people and the United States. Pet. App. 13a. Neither of those sources, however, provides law that a court may apply in reviewing the IHS's decision to allocate appropriated funds to purposes other than the ICP.

A. NEITHER STATEMENTS MADE DURING CONGRESSIONAL HEARINGS NOR CONGRESSIONAL COMMITTEE REPORTS PROVIDE LAW TO APPLY

In relying on precatory statements made in congressional committee reports and discussions during congressional hearings as "law to apply," the court of appeals elevated those statements to the level of binding law, in direct disregard of this Court's admonition that such unenacted materials do not have the "force of law." *American Hospital Ass'n* v. *NLRB*, 111 S. Ct. 1539, 1545 (1991). See also *United States* v. *R.L.C.*, 112 S. Ct. 1329, 1342 (1992) (Thomas, J., concurring in part and in the judgment) ("committee reports and floor statements * * * are not law"). That principle carries special force in the appropriations context, where, given the limited purpose of appropriations measures to provide funds for authorized programs, it is especially clear that "[e]xpressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress." *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 191 (1978).

This is not an instance of looking to committee reports or testimony in congressional hearings as a guide to resolving particular ambiguities in the text of an Act of Congress. The appropriations acts at issue here are written in the broad and general terms typical of such enactments; they make money available for "expenses necessary to carry out" the IHS's functions under its various authorizing statutes, and they contain no language that could even remotely be "construed" to refer to—much less require

funding for—specific services such as those furnished under the ICP. Rather, the courts below relied on statements in committee reports and hearing testimony as a *substitute* for statutory text. However, "the Constitution is quite explicit about the procedure that Congress must follow in legislating," *American Hospital Ass'n*, 111 S. Ct. at 1545, and committee hearings and reports are not the end product of that procedure. Cf. *INS* v. *Chadha*, 462 U.S. 919 (1983). See *American Hospital Assn*, 111 S. Ct. at 1546 (citing *Public Employees Retirement System of Ohio* v. *Betts*, 492 U.S. 158, 168 (1989) ("legislative history that cannot be tied to the enactment of specific statutory language ordinarily carries little weight" even "in judicial interpretation of the statute" itself)).

In *International Union, UAW* v. *Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984) (Scalia, J.), cert. denied, 474 U.S. 825 (1985), the District of Columbia Circuit expressly rejected the suggestion that legislative history could provide "law to apply" permitting judicial review of an agency's allocation of a lump-sum appropriation among various programs:

> [L]egislative history is relevant to our inquiry—but not directly relevant. As the Supreme Court has said (in a case involving precisely the issue of Executive compliance with appropriation laws, although the principle is one of general applicability): "legislative intention, without more, is not legislation." *Train* v. *City of New York*, 420 U.S. 35, 45 * * * (1975). The issue here is not how Congress expected or intended the Secretary to behave, but how it *required* him to behave, through the only means by which it can (as far as the courts are concerned, at least) require anything—the enactment of legislation. Our focus, in other words, must be on the text of the appropriation.

746 F.2d at 860-861.[12]

The Comptroller General, whose "accumulated experience and expertise" in the field of government appropriations gives special weight to his opinions, see *International Union*, 746 F.2d at 861 (citing *M. Steinthal & Co.* v. *Seamans*, 455 F.2d 1289, 1305 (D.C. Cir. 1971)), has reached the same conclusion. In response to a claim that a contract had been awarded in violation of sentiments expressed in a congressional committee report, the Comptroller General explained that "there is a clear distinction between the imposition of statutory restrictions or conditions which are intended to be legally binding and the technique of specifying restrictions or conditions in a non-statutory context." *LTV Aerospace Corp.*, 55 Comp. Gen. 307, 318 (1975).[13] When "Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements

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[12] See also *United States* v. *Board of Education of the City of Chicago*, 621 F. Supp. 1296, 1393 (N.D. Ill. 1985) (the Secretary of Education "is not legally bound by program allocations or budgetary estimates not incorporated into the language of an appropriation act itself"), vacated on other grounds, 799 F.2d 281 (1986).

[13] Indeed, Congress has included legally binding restrictions on the IHS's expenditure of lump-sum appropriations, but none of them have mentioned the ICP or required the IHS to continue to fund the ICP. For example, the 1979 appropriation included a proviso "[t]hat funds made available to tribes and tribal organizations through grants and contracts authorized by the Indian Self-Determination and Education Assistance Act of 1975 * * * shall remain available until September 30, 1981." Pub. L. No. 96-126, Tit. II, 93 Stat. 954, 973, *reprinted in* Pet. App. 67a. For other examples, see Pet. App. 69a-73a.

on Federal agencies." *Id.* at 319. As the Comptroller General explained, "when Congress does not intend to permit agency flexibility, but intends to impose a legally binding restriction on the agency's use of funds, it does so by means of explicit statutory language." *Id.* at 318; see also *In re Financial Assistance to Intervenors,* 59 Comp. Gen. 228, 231 (1980); United States General Accounting Office, *Principles of Federal Appropriations Law* 5-94 to 5-103 (1982).

To be sure, agencies like the IHS routinely provide Congress with considerable detail on programs and expenditures when they submit justifications for appropriations requests. For example, in 1983 hearings before a House appropriations subcommittee, relied upon by the court of appeals, Pet. App. 11a-12a, the IHS submitted a document discussing not only the ICP, but also specific clinics and hospitals, repairs to facilities, staff housing problems, and alcoholism and urban health projects. See *Department of the Interior and Related Agencies Appropriations for 1984: Hearings Before a Subcomm. of the House Comm. on Appropriations,* 98th Cong., 1st Sess. Pt. 3, at 331-418 (1983). That explanation of the agency's programs was intended to make "for better relations with Congress (the appropriations committees)," and "thereby facilitate[ ] the process of obtaining replacement appropriations." *Blackhawk Heating & Plumbing Co.* v. *United States,* 622 F.2d 539, 547 (Cl. Ct. 1980). It did not convert a lump-sum appropriation into an itemized listing of specific programs and services that IHS was required to continue to provide.

Likewise, it is not unusual for congressional committee members to attempt to influence the expenditure of general appropriations by way of statements in committee reports. See M. Kirst, *Government Without Passing Laws: Congress' Nonstatutory Techniques for Appropriations Control* 30-39 (1969). In this way, members of Congress hope to constrain the exercise of agency discretion through "extra-legal" methods. The force of those directives is, however, political, not legal. Executive officials "ignore such expressions of intent at the peril of strained relations with the Congress," *LTV Aerospace Corp.,* 55 Comp. Gen. at 325-326, not intervention by the courts. See *American Hospital Ass'n,* 111 S. Ct. at 1545-1546 ("the remedy for noncompliance with the admonition [in a congressional committee report] is in the hands of the body that issued it").

In sum, to be legally binding, congressional intent must be embodied in legislative language enacted by both Houses of Congress and signed by the President, as the Constitution requires. *INS* v. *Chadha,* 462 U.S. 919 (1983). The materials on which the court of appeals relied as evidence of congressional intent here did not undergo that process and therefore cannot constitute "*law* to apply" by a court in reviewing the IHS's action in this case. *Citizens to Preserve Overton Park,* 401 U.S. at 410 (emphasis added).

B. THE FEDERAL "TRUST" REPONSIBILITY TO INDIANS PROVIDES NO LAW TO APPLY IN THIS SETTING

The court of appeals did not rest its reviewability holding exclusively on the snippets of legislative history of the IHS's lump-sum appropriations acts. The court also relied (Pet. App. 13a-15a) on its view of a "special relationship" between the federal government and the Indian people (which it variously termed a "guardian-ward," "trust," or "fiduciary" relationship, see Pet. App. 14a, 15a n.7). The court held that the United States owes a general duty of "fairness" to Indian peoples that imposes substantive constraints on the discretion of the Executive

Branch even in the absence of any Indian property interests or other vested rights—and even in the absence of any statute in which Congress has embodied such a duty in judicially enforceable standards. In whatever terms it may be described, however, the "special relationship" between the federal government and the Indians does not provide "law to apply" in this case.

"It is, of course, well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity." *United States* v. *Cherokee Nation of Oklahoma*, 480 U.S. 700, 707 (1987). That federal responsibility, however, "do[es] not create property rights where none would otherwise exist but rather presuppose[s] that the United States has interfered with existing tribal property interests." *Ibid.* In this case, no Indian property rights are at stake.[14] Funds made available pursuant to the authorization in the Snyder Act or the IHCIA are gratuitous appropriations, not trust funds belonging to the Indians. *Scholder* v. *United States*, 428 F.2d 1123, 1129 (9th Cir.), cert. denied, 400 U.S. 942 (1970); *Quick Bear* v. *Leupp*, 210 U.S. 50, 80-81 (1908) (monies appropriated for support of Indian schools are gratuitous appropriations, but monies appropriated to fulfill treaty obligations are "trust" funds and may be used to pay for the education

[14] Indeed, even where Indian property rights *are* implicated, the term "trust" may be something of a misnomer. "[T]he fiduciary relationship springs from the statutes and regulations which 'define the contours of the United States' fiduciary responsibilities.' " *Pawnee* v. *United States*, 830 F.2d 187, 192 (Fed. Cir. 1987), cert. denied, 486 U.S. 1032 (1988), (quoting *United States* v. *Mitchell*, 463 U.S. 206, 224 (1983)). Thus, where the federal government has fully complied with all applicable statutes, treaties, regulations, and contractual provisions in dealing with Indian property interests, no claim for breach of "trust" can be stated. *Pawnee*, 830 F.2d at 192; cf. *Nevada* v. *United States*, 463 U.S. 110, 128, 142 (1983).

of Indian pupils in sectarian schools). Cf. *United States* v. *Dann*, 470 U.S. 39, 49-50 (1985). In distributing such funds, "[t]he United States acts in no more a fiduciary capacity * * * than it does in distributing *any* funds appropriated by Congress." *James* v. *Department of Health & Human Servs.*, 12 Indian L. Rep. (Am. Indian Law Training Program) 3097, 3100 (D.D.C. Aug. 14, 1985).

The court of appeals thus fundamentally misapprehended the nature of the "special relationship." The responsibility for articulating, giving content to, and implementing the "special relationship" between the United States and Indians and Indian Tribes lies with Congress, U.S. Const. Art. I, § 8, Cl. 3 (Indian Commerce Clause); *United States* v. *Kagama*, 118 U.S. 375, 383-384 (1886), or with the President and the Senate in making treaties, not with the courts. In the setting of this case, Congress has chosen to implement *its* view of the special relationship between the United States and Indians by enacting the Snyder Act and IHCIA (and annual appropriations under those Acts) and conferring on the IHS and the BIA broad discretion and flexibility to determine how best to provide services to Indians, including the "relief of distress and conservation of health." Because Congress declined to create vested rights in any particular programs or services provided under the auspices of the Snyder Act and the IHCIA—or to specify particular standards that must be followed by the IHS and BIA in allocating funds—there are no judicially enforceable standards that remove the IHS's action at issue here from the category of those "committed to agency discretion by law." 5 U.S.C. 701(a) (2). The notion of a "special relationship" between the United States and the Indians possesses no *independent* legal force that would furnish a basis for judicial review of discretionary agency decisions concerning the allocation

of appropriated funds, where Congress itself has declined to impose limits on the exercise of that discretion.

Indeed, although the court of appeals concluded that a "duty of fairness," coupled with the Snyder Act's general provision "for the relief of distress and conservation of health," 25 U.S.C. 13, provided a basis for judicial review, Pet. App. 14a-15a, the court did not even attempt to employ its notion of law to apply in evaluating the IHS's funding reallocation at issue here. And any such attempt would be an exercise in futility. The IHS terminated the ICP so that it could utilize the available funds and resources in a manner that would advance the health of handicapped Indian children nationwide, rather than solely in the Southwest. What is a "fair" allocation of scarce public funds in such circumstances is a judgment that a court is simply not equipped to make. Cf. *Hoopa Valley Tribe* v. *Christie*, 812 F.2d 1097, 1102 (9th Cir. 1986) (holding that there is no federal trust responsibility that can be discharged to the benefit of some Indians but at the expense of others).

In sum, the extra-statutory and unanchored "trust" principle of judicial review announced by the court of appeals has an almost limitless potential for justifying judicial second-guessing of Executive Branch decision-making affecting Indians. It finds no support in this Court's cases, and it has been rejected by the other lower federal courts to address the issue. It should not be permitted to stand in this case.

C. IN THE ABSENCE OF LAW TO APPLY, THE DECISION TO END THE INDIAN CHILDREN'S PROJECT WAS COMMITTED TO AGENCY DISCRETION

That there should be no law to apply to the agency decision at issue in this case is hardly surprising. Courts, including the Tenth Circuit, have observed that agency

funding decisions are "notoriously unsuitable for judicial review, for they involve the inherently subjective weighing of the large number of varied priorities which combine to dictate the wisest dissemination of an agency's limited budget." *Community Action of Laramie County, Inc.* v. *Bowen*, 866 F.2d 347, 354 (10th Cir. 1989) (citing *Alan Guttmacher Inst.* v. *McPherson*, 597 F. Supp. 1530, 1536-1537 (S.D.N.Y. 1984)), aff'd as modified, 805 F.2d 1088 (2d Cir. 1986)); *California Human Development Corp* v. *Brock*, 762 F.2d 1044, 1052 (D.C. Cir. 1985) (Scalia, J., concurring) ("allocation of * * * funds among various eligible recipients, none of which has any statutory entitlement to them, is traditionally a matter 'committed to agency discretion by law' "); compare *Heckler* v. *Chaney*, 470 U.S. 821, 831-832 (1985) (agency decisions not to enforce the law are committed to agency discretion because they involve "complicated balancing of a number of factors which are peculiarly within its expertise," including the allocation of scarce "agency resources" and "the proper ordering of its priorities"). That is particularly true where, as here, the agency's decision involves allocation of lump-sum appropriations, because such appropriations have long been understood to "leave[ ] it to the recipient agency (as a matter of law at least) to distribute the funds among some or all of the permissible objects as it sees fit." *International Union*, 746 F.2d at 861; compare *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 282 (1987) (agency action unreviewable where matter has traditionally been regarded as committed to agency discretion); *Heckler* v. *Chaney*, 470 U.S. at 832 (same).

For the foregoing reasons, among others, the courts have long declined to review agency decisions involving the termination or reallocation of agencies services or

resources. See *National Federation of Federal Employees* v. *United States*, 905 F.2d 400, 405 (D.C. Cir. 1990) (decision to close military base);[15] *Armstrong* v. *United States*, 354 F.2d 648, 649 (9th Cir. 1965), cert. denied, 384 U.S. 946 (1966) (decision to close Navy repair facility); *Sergeant* v. *Fudge*, 238 F.2d 916, 917 (6th Cir. 1956), cert. denied, 353 U.S. 937 (1957) (decision to discontinue post office); *Los Angeles Customs & Freight Brokers Ass'n* v. *Johnson*, 277 F. Supp. 525, 532 (C.D. Ca. 1967) (decision to shift location of customs office).[16] The IHS action that respondents challenge here is, in principle, no different from the administrative decisions challenged in those cases.

[15] Cf. *Specter* v. *Garrett*, 971 F.2d 936 (3d Cir. 1992) (substance of President's decision to close military base not subject to judicial review), vacated on other grounds *sub nom. O'Keefe* v. *Specter*, No. 92-485 (Nov. 9, 1992).

[16] A wide variety of other agency resource allocation and economic decisions have also been held to be judicially unreviewable. See *Electricities of North Carolina, Inc.* v. *Southeastern Power Administration*, 774 F.2d 1262 (4th Cir. 1985) (allocation of power by power agency); *Greenwood Utilities Comm'n* v. *Hodel*, 764 F.2d 1459 (11th Cir. 1985) (same); *City of Santa Clara* v. *Andrus*, 572 F.2d 660, 668 (9th Cir.), cert. denied, 439 U.S. 859 (1978) (same); *State of Florida Department of Business Regulation* v. *U.S. Dep't of Interior*, 768 F.2d 1248 (11th Cir. 1985) (decision to acquire tract of land for Seminole Indians), cert. denied, 475 U.S. [illegible] (1986); *Strickland* v. *Morton*, 519 F.2d 467 (9th Cir. 1975) (agency judgment that public land was suitable for disposal); *Frakes* v. *Pierce*, 700 F.2d 501 (9th Cir. 1983) (Department of Housing and Urban Development rental determinations); *Grace Towers Tenants Ass'n* v. *Grace Housing Development Fund, Inc.*, 538 F.2d 491 (2d Cir. 1976) (same); *Harlib* v. *Lynn*, 511 F.2d 51 (7th Cir. 1975) (same); *People's Rights Organization* v. *Bethlehem Associates*, 356 F. Supp. 407 (E.D. Pa. 1973), aff'd without op., 487 F.2d 1395 (3d Cir. 1973) (same); *Hahn* v. *Gottlieb*, 430 F.2d 1243 (1st Cir. 1970) (same).

Indeed, in the instant case the agency's ability to exercise discretion is especially important because judicial review, if permitted, would threaten severe and "disruptive practical consequences." *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 456 (1979). The IHS operates the largest direct health care delivery system in the Department of Health and Human Services. It employs 12,000 people and delivers health care to more than 1.5 million Indians and Alaska Natives nationwide. See p. 2, *supra;* see also Roger Walke, *Federal Programs of Assistance to Native Americans*, S. Prt. No. 102-62, 102d Cong., 1st Sess. 140 (1991). Agency resources are often scarce, and many recipients, like respondents, are in rural and remote areas. To permit a court to second-guess the IHS's decisions concerning how it may best allocate its resources would simply result in delay and possible denial of health services to communities in dire need. Congress is, of course, free to impose standards on the IHS that could, in turn, give rise to judicial review of allocation decisions—and to the delay and disruption of the delivery of health care that might ensue. But Congress has not done so. As a result, the IHS funding and allocation decision at issue here is "committed to agency discretion by law," 5 U.S.C. 701(a) (2), and not subject to judicial review.[17]

[17] In *Webster* v. *Doe*, 486 U.S. at 604-605, where this Court found no law to apply to the respondent's APA claim, the case was remanded for consideration of the respondent's colorable constitutional claim. In the instant case, however, this Court need not remand because the consitutional claim advanced by respondents below is not colorable. In their complaint, respondents alleged that their Fifth Amendment due process rights were violated by the termination of the ICP. J.A. 15. In their district court pleadings, respondents elaborated

II. THE IHS DECISION TO TERMINATE THE PROJECT WAS NOT A "RULE" SUBJECT TO THE NOTICE AND COMMENT PROVISIONS OF THE APA, AND RULEMAKING IS NOT OTHERWISE REQUIRED BY THIS COURT'S DECISION IN *MORTON* V. *RUIZ*

Although both courts below held that there existed meaningful standards by which to judge the IHS decision to terminate the ICP, neither court examined the substance of the agency's decision. The district court held that the decision to terminate the ICP constituted legislative rulemaking subject to the notice-and-comment requirements of the APA, 5 U.S.C. 553. Pet. App. 35a-44a. Although the court of appeals also held that the ICP's decision to reallocate its resources was subject to notice-and-comment procedures, it did not rely on the APA in reaching that conclusion. Instead, the court of appeals relied on one of its own prior decisions that had interpreted this court's decision in *Morton* v. *Ruiz*, 415 U.S. 199 (1974), to require notice-and-comment procedures whenever "the government 'cuts back congressionally created and funded programs for Indians' even when the

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on this allegation by explaining that they had a legal entitlement to the ICP that "stem[med] from the federal trust responsibility to provide services for Indian health care." Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss for Lack of Jurisdiction and In the Alternative for Summary Judgment, Record Entry 77, at 28. Neither the district court nor the court of appeals addressed that claim, but, as the foregoing discussion of the federal "trust" responsibility makes plain, any entitlement to services would have to be derived from a treaty, statute, or implementing regulations. Generalized notions of a "trust" responsibility to Indians cannot, in themselves, create a property right that would entitle respondents to a Fifth Amendment due process hearing. As we have explained, no such entitlement is created by the statutes or regulations at issue here.

Indians have no entitlement to the benefits." Pet. App. 15a (quoting *Vigil* v. *Andrus*, 667 F.2d. 931, 936 (10th Cir. 1982)). Both rationales for requiring notice and comment are mistaken.

A. THE DECISION TO TERMINATE THE PROJECT WAS NOT A "RULE"

1. An agency decision as to how to expend appropriated funds is not a "rule" subject to the notice-and-comment provisions of the APA. That conclusion is compelled by *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971). *Overton Park* involved a challenge to an agency decision to expend federal funds to build a highway through a park. The plaintiffs challenged that decision on the ground that the Secretary of Transportation's antecedent determination that no "feasible and prudent" alternative route existed was improper. See 401 U.S. at 405. The plaintiffs argued that the Secretary's determination to spend the funds was the promulgation of a "rule" within the meaning of the APA, and that the APA's "substantial evidence" test accordingly should apply on judicial review of that determination.

This Court rejected the plaintiffs' argument. 401 U.S. at 414. It noted that the "substantial evidence" test "is authorized only when the agency action is taken pursuant to a rulemaking provision of the [APA]" (or in another circumstance not relevant here). *Ibid.* But, the Court held, "[t]he Secretary's decision to allow the expenditure of federal funds to build [the highway] through Overton Park was plainly not an exercise of a rulemaking function," and the substantial evidence test accordingly was "not applicable." *Ibid.*

The same principle governs this case. Under *Overton Park*, agency decisions concerning the discretionary allocation of funds for the provision of services are not subject to the procedural requirements that govern the promulgation of rules. In particular, the IHS's decision to stop funding the ICP as it had been constituted, and instead to expend its resources for the benefit of Indian children nationwide, was not the promulgation of a rule under the APA.

That conclusion is in accord with the language of the APA, as well as with long-standing considerations of administrative practice. The term "rule" is defined in the APA to mean:

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing[.]

5 U.S.C. 551(4). Although that definition is broad, it is not unlimited, and it does not, contrary to the district court's view, "include nearly every statement an agency may make." Pet. App. 38a (quoting *Batterton* v. *Marshall*, 648 F.2d 694, 700 (D.C. Cir. 1980)). To the contrary, "[k]nowledgeable authorities in this field observed shortly after passage of the [APA] that certain types of agency action are neither rule making nor adjudication." *International Telephone & Telegraph Corp.* v. *Local 134*, 419 U.S. 428, 442 (1975) (quotation omitted). See also 2 K. Davis, *Administrative Law Treatise* § 8:1, at 158 (2d ed.

1979); W. Gardner, *The Procedures by Which Informal Action Is Taken*, 24 Admin. L. Rev. 155, 156 (1972). Among those actions are an agency's decisions concerning how to allocate its appropriated funds to accomplish its statutory functions.

As this Court recognized in *Overton Park*, decisions by an agency to spend (or not to spend) money for particular purposes do not constitute "rules." That is because the APA definition of "rule" is limited to "agency statement[s]" that have "future effect." See *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 217, 221 (1988) (Scalia, J. concurring) ("[A] rule is a statement that has legal consequences only for the future," and "deals with what the law will be."). The legislative history of the APA confirms this understanding. See S. Rep. No. 752, 79th Cong., 1st Sess. 11 (1945) (rules "formally prescribe a course of conduct for the future rather than merely pronounce existing rights or liabilities"); H.R. Rep. No. 1980, 79th cong., 2d Sess. 20 (1946) (same). Under that definition, an agency *action* does not become a rule merely because it has some future consequence. Rather, it is only when the agency action consists of a *statement* that has future effects that the action is a rule under the APA. And a statement—as opposed to an action—can be said to have a future effect only when it has an effect on the legal rights or obligations of individuals or of the agency itself, ordinarily by guiding the course of some future proceeding.[18]

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[18] The *Attorney General's Manual on the Administrative Procedure Act (1947)*, to which this Court has accorded deference "because of the role played by the Department of Justice in drafting the legislation," *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 546 (1978), states that "[r]ule making is agency action which regulates the future conduct of either groups of persons or a single person." *Manual* at 14. The conclusion that the term "future effect" in the definition of "rule" means future *legal* ef-

In the case of an agency's decision concerning how to allocate its funds among its various statutory responsibilities, the agency's "statement" of that decision has no "effect" at all on the legal rights or obligations of any private individual, or even on any government employee. To be sure, the actual expenditure of the funds may well have a substantial impact on individuals. But the agency's *statement* has no independent future effect, because it will have no legal significance in any future proceeding, formal or informal, in which the rights or obligations of any individual are determined. Cf. *United States* v. *Cooper,* 699 F. Supp. 69, 74 (W.D. Pa. 1988) (list of placement sites for physicians who have received National Health Service Corps Scholarships is not a rule). Rather, an agency's decision concerning how to allocate its resources is entirely self-contained, and does not purport to bind or guide other decisions that may be made by the agency (or private parties) down the road. It therefore is not a "rule."

To conclude otherwise would be to hold that *all* agency action is rulemaking, because agencies ordinarily communicate their actions by using written or oral words and because all agency action has some impact in the future. For example, every time the IHS decides to replace (or not to replace) equipment at any of its 50 hospitals, to offer a

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fect is also confirmed by the ordinary meaning of the word "rule," which refers to a measure that has an abiding legal effect. See *Black's Law Dictionary* 1195 (5th ed. 1983) ("An established standard, guide, or regulation. A principle or regulation set up by authority, prescribing or directing action or forbearance; as, the rules of a legislative body, of a company, court, public office, or the law, of ethics. Precept attaching a definite detailed legal consequence to a definite detailed state of facts."); *Random House Dictionary of the English Language* 1680 (2d ed. 1987) ("a principle or regulation governing conduct, action, procedure, arrangement, etc."); *Webster's Third New International Dictionary* 1986 (1986) ("prescribed, suggested, or self-imposed guide for conduct or action; a regulation or principle").

new diagnostic test (or discontinue use of an old one) at any of its 158 health centers, or to shift staff among its 300 health stations and satellite clinics to meet current needs for health care, that conduct will have some consequences for individuals who use the equipment, make use of the diagnostic test, or were served by staff members whose duty station or job description is altered. Under respondents' theory, each of those actions would require publication in the Federal Register and—unless the action fell within one of the exceptions in 5 U.S.C. 553(a) or (b)[19]—full notice-and-comment procedures. Indeed, since the IHS would be required to undergo those procedures not only when it altered existing services, but also when it decided to offer new ones, the effect would be a substantial delay in the provision of needed health services to Indians.

Moreover, under respondents' theory that any agency action that has an impact in the future is a "rule" for purposes of the APA, the category of "rules" would not only encompass the long-recognized and distinct category of informal agency action, but would also swallow up the category of "orders" and thereby eliminate "adjudi-

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[19] The APA does not require notice-and-comment procedures for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," 5 U.S.C. 553 (b) (A), nor does it require such procedures for "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." 5 U.S.C. 553 (a) (2). Although a number of those exceptions may be thought to apply to this case if the decision to terminate the ICP constituted a "rule," the government did not argue before the court of appeals that any of them applied. With respect to the exception for "a matter relating to • • • benefits," the Secretary did issue a memorandum in 1971 to all HHS (then-HEW) components directing them, as a matter of policy, to follow notice-and-comment procedures when issuing rules in areas that fall within this exemption. See 36 Fed. Reg. 2532 (1971); see also 47 Fed. Reg. 26,860 (1982). Accordingly, the Department has not invoked that exemption in this case.

cations" from the APA. The APA's definition of "adjudication" is derivative of its definition of "order." An "adjudication" is defined as "agency process for the formulation of an order," 5 U.S.C. 551(7), and "order" in turn is defined as "a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making." 5 U.S.C. 551(6). If any agency action that has an impact in the future were a "rule," however, then nothing would fall into the class of "orders" as defined by the APA. Those actions that are ordinarily termed "orders" would, under respondents' theory, turn out to be rules, because they have some impact as precedents on future proceedings and certainly have a very real future impact on the parties whose rights they determine. In short, the category of adjudications would be an empty set under respondents' theory. In fact, however, the APA defines and employs the term "rule" in its common-sense and accepted manner, referring to a measure that in itself has a direct *legal* effect in the future. It does not include agency actions that are fully consummated in the present simply because they may have *practical* consequences in the future.

B. RULEMAKING PROCEDURES WERE NOT REQUIRED BY THIS COURT'S DECISION IN *MORTON* v. *RUIZ*

Rather than holding that all resource allocation decisions by all federal agencies constitute "rules" subject to the APA's notice-and-comment procedures, the court of appeals relied on its notion of Indian law principles to announce an equally broad (and erroneous) holding that

"notice and comment procedures should be provided any time the government cuts back congressionally created and funded programs for Indians even when the Indians have no entitlement to the benefits." Pet. App. 15a (internal quotation omitted). That proposition represents a radical and unwarranted expansion of rulemaking requirements beyond those imposed by the APA, contravenes the pronouncements of this Court, and misconstrues this Court's decision in *Morton* v. *Ruiz*.

In *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), this Court emphatically held that federal courts have no authority to impose procedural requirements on federal agencies based on considerations of public policy. Under *Vermont Yankee*, a reviewing court is not free to force upon an agency the court's "own notion of which procedures are 'best' or most likely to further some vague, undefined public good." 435 U.S. at 549. Rather, courts are limited to determining whether the agency has complied with the procedures mandated by the relevant statutes. *Ibid.*

Nothing in the APA provides the slightest support for the court's holding that all agency decisions that may adversely affect Indians are automatically subject to notice-and-comment procedures.[20] Nor does any other statute or regulation require that agencies providing services to Indians engage in formal notice-and-comment rulemaking as a prerequisite to modifying or terminating

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[20] The legislative history of the APA in fact cuts against such a requirement. The House Report explains that the exception from notice-and-comment requirements for matters involving "public property," 5 U.S.C. 553 (a) (2), "include[s] property held by the United States in trust or as guardian, as Indian property is often held." H.R. Rep. No. 1980, *supra*, at 23. Thus, Congress specifically furnished an exemption where Indian interests are directly implicated.

whatever discretionary programs or services they offer. In particular, neither the Snyder Act nor the IHCIA—the principal statutes authorizing IHS expenditures on Indian health care—imposes any such requirement.[21]

Likewise, the "special relationship" between Indians and the federal government does not provide any basis for imposing such procedural requirements. As explained above, pp. 21-24, *supra,* that relationship is not an independent legal constraint on the actions of the federal government. The only specific and enforceable duties owed to Indians by the federal government are those derived from treaty, statute, or regulation. Since no treaty, statute, or regulation imposes the extraordinary notice-and-comment procedures adopted by the court of appeals in this case, the court's holding is in direct violation of *Vermont Yankee.*[22]

[21] In general, appropriations under the Snyder Act are "gratuitous appropriations of public monies." *Scholder* v. *United States,* 428 F.2d at 1129. IHS regulations make clear that there is no entitlement to particular IHS services and that the health services provided by the agency "to any particular Indian community will depend upon the facilities and services available from sources other than the [IHS] and the financial and personnel resources made available to the [IHS]." 42 C.F.R. 36.11(c).

[22] Congress has by statute directed the IHS to consult with Indian tribes before making certain decisions. For example, the IHS is required by the 1988 amendments to the IHCIA to consult with the affected tribes before building, renovating, or closing Indian health facilities. See Indian Health Care Amendments of 1988, Pub. L. No. 100-713, § 301, 102 Stat. 4812-4813. In addition, the BIA informs us that it has issued certain non-binding guidelines for consulting with Indian tribes on certain personnel management decisions. Thus, the fact that notice-and-comment rulemaking procedures need not be followed before the IHS revises or terminates discretionary programs does not necessarily mean that those agencies will act without taking into account the comments of Indians. In fact, direct consultation with the affected tribes may often be a more effective way of receiving the input of tribes and their members than would publication of a notice in the Federal Register and inviting written submissions to an office in Washington, D.C.

Nor does anything in this Court's decision in *Morton* v. *Ruiz,* 415 U.S. 199 (1974), which preceded *Vermont Yankee,* require a different conclusion. *Ruiz* involved a challenge to a provision in the BIA's unpublished internal manual that limited eligibility for general assistance to those Indians living "on" reservations. The Court found that the relevant statutes permitted those benefits to be available to Indians living on *or near* reservations. 415 U.S. at 230. The Court held that the BIA's failure to publish its narrower eligibility standard rendered that standard invalid. *Id.* at 235-236.

This Court did not decide *Ruiz* on the ground that the on-the-reservation eligibility standard was a "rule" under the APA that could only be promulgated through notice-and-comment procedures. Instead, it held that the BIA itself had declared that all such "directives" that inform the public of "eligibility requirements" must be published. *Id.* at 235. Indeed, the Court adverted to the fact that that publication requirement was "possibly more rigorous than would otherwise be required" by the APA, thus leaving open the question whether it would have been viewed as a rule absent the agency's own publication requirement. *Ibid.* The Court's holding was simply that the BIA "must comply, at a minimum, with its own internal procedures." *Ibid.*[23]

[23] Indeed, even if the Court had decided *Ruiz* on the ground that the on-the-reservation eligibility requirement at issue there was a "rule" under the APA, the decision would have little bearing on this case. The eligibility standard at issue in *Ruiz* may well have been a "statement" of "future effect," 5 U.S.C. 551(4), in the sense that future determinations of individuals' eligibility for IHS benefits would be controlled by that statement. Thus, unlike the resource-allocation decision at issue in this case, the eligibility requirement in *Ruiz* may well have been a "rule" under the APA.

Ruiz thus does not remotely suggest that all agency decisions adversely affecting Indians—especially those that are not "rules" under ordinary analysis—must be subjected to the full panoply of procedural requirements applicable to legislative rules. To the contrary, the Court's decision rested on the determination that the BIA had attempted to impose a rule of personal eligibility on individual Indians without following the procedures that the agency had imposed on itself for promulgating such rules. As such, it has no bearing on this case, which involves neither a rule nor personal eligibility for IHS services. This case involves the allocation of staff and other resources within the IHS and the general level and type of services that will be offered at particular locations. Nothing in *Ruiz* suggests that notice-and-comment procedures must be followed in that setting.

To be sure, this Court in *Ruiz* did refer to the federal government's duty "to deal fairly with Indians" and to "the distinctive obligation of trust incumbent upon the Government in its dealing with these dependent and sometimes exploited people." 415 U.S. at 236. But those references were made only after the Court had concluded that Congress had made Indians living near reservations eligible for benefits and that the eligibility requirement at issue there was the type of standard for which the agency's own rules prescribed publication. Thus, as the Court itself explained in the same paragraph in which it adverted to the federal government's "trust" responsibility, the federal government's duty of fairness was triggered by "the *legitimate* expectation of * * * Indians," and the agency could not "extinguish[ ]" those expectations by means of rules "not promulgated in accordance with its own procedures, to say nothing of those of the [APA]." *Ibid.* (emphasis added). Although the Court in that passage viewed the "trust" responsibility as a special reason why the government must carefully comply with its pre-existing legal obligations, the

Court did not suggest that the federal "trust" responsibility provided an independent source of legal duties that a court could impose upon an administrative agency that has dealings with Indians.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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